(2)

90-1393

No.

Supreme Court, U.S.
FILED
MAR 4 1991
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IN THE

Supreme Court of the United States

1990 TERM

WILLIAM KUNTZ, III, *et al.*,

Petitioner,

against

CITY OF DAYTON, OHIO, *et al.*,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, SECOND APPELLATE DISTRICT, MONTGOMERY COUNTY, OHIO.

PETITION FOR A WRIT OF CERTIORARI

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Dated: March 4, 1991

THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1991
(4671—CVR-307)

CORRECTED COPY

Questions Presented

Whether the attorney's "charging lien" can exist under an engagement under the Bankrupty Act 11 U.S.C. 327?

Whether the attorney's "charging lien" can exist pending the appeal of a Bankruptcy Court fee award?

Parties*

The parties to this appeal are William Kuntz, III, petitioner, and Mssrs. Manley and Fischer and Manley, Burke and Fischer, LPA, and the City of Dayton, Ohio.

*For full details listing see appendix of all parties to eminent domain. Appendix pp. 10c, 11c, 12c, 20d, 21d.

Decision of the Court of Appeals, Supreme Court of Ohio

Under the provisions of 28 U.S.C. 1257, an appeal for certiorari to the United States Supreme Court from "final judgments or decrees rendered by the highest court of a state in which a decision could be had . . ." and the authority of the court to review and enforce the various statutes and law of the United States with regards to bankruptcy proceedings and the common law.

Table of Contents.

	Page
Questions Presented	i
Parties	ii
Decision of the Court of Appeals, Supreme Court of Ohio	iii
Statement of the Case	1
Argument	4
APPENDIX:	
Appendix A—Decision of the Supreme Court of Ohio, Dated December 5, 1990	1a
Appendix B—Decision of the Supreme Court of Ohio, Dated December 5, 1990	1b
Appendix C—Motion for Leave to Appeal/Certify the Record From the Court of Appeals of Montgomery County, Ohio—Second District	1c
Appendix D—Memorandum of Appellee Manley, Burke & Fischer Opposing Jurisdiction	1d
Appendix E—Notice of Appeal to the Supreme Court of Ohio	1e
Appendix F—Opinions From The Court of Appeals of Montgomery County	1f

Page

Appendix G—Application Under Rule 26 for Reconsideration 1g

Appendix H—Decisions and Entry of Court of Appeals on Reconsideration, Dated July 30, 1990, and September 7, 1990 ..... 1h

Appendix I—Decision and Entry Amending the Order of Distribution (Sustaining Counsel's Motion to Amend Distribution) 1i

Appendix J—Order of the United States Banktuptcy Court 1j

Appendix K—Extract From a Transcript Before the United States Bankruptcy Court 1k

Appendix L—Complaint in Manley, Burke & Fischer vs. Kuntz 1l

TABLE OF CASES.

Page

CASES CITED:

City of Dayton, Ohio, vs. William Kuntz, III, et al., 88 U.S. 749, cert denied 1

William Kuntz, III, vs. Society Bank, N.A., Case No. 90-1023 3

Re: One Westminister Co., Inc., Bankruptcy Case No. 83-14 2

Re: One Westminister Co., Inc., District Court, Delaware, Case No. 89-00281 3

Re: One Westminister Co., Inc., U.S. Court of Appeals, 3rd Cir., Case No. 90-3442 3

Re: Tarricone, Inc., 76 B.R. 53, Bankruptcy Court, S.D.N.Y. 1987, Schwartzberg, B.J. 4

STATUTES:

11 U.S.C. 327 ..... i, 3, 5, 6

11 U.S.C. 329 ..... 5, 6

28 U.S.C. 1257 iii

No.

IN THE

SUPREME COURT OF THE UNITED STATES

1990 TERM.

WILLIAM KUNTZ, III, *et al.*,

Petitioner,

against

CITY OF DAYTON, OHIO, *et al.*,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, SECOND APPELLATE DISTRICT, MONTGOMERY COUNTY, OHIO.

PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

The present petition stems from the Court's ruling in *City of Dayton, Ohio vs. William Kuntz, III, et al.*, 88 U.S. 749, cert. denied, which vested in the City of Dayton the property commonly known there at the Alladin Cleaners for

development of a downtown office tower project utilizing federal assistance under a H.U.D. block grant to the City of Dayton, Ohio.

Upon the denial of petition, it was discovered that the City of Dayton, Ohio, had withdrawn without approval of the United States Bankruptcy Court in the District of Delaware a $100,000 cash bond plus accrued interest which had been posted in the Common Pleas Court of Montgomery County, Ohio, in favor of the named property owners. Those property owners named in that action were William Kuntz, III, and One Westminister Co., Inc., a Delaware Corporation, then and now under Ch. 11 of the Bankruptcy Act, Del. Case 83-14 HSB Ch. 11.

At that time and without leave of the Bankruptcy Court, and over the express instruction of petitioner, Mssrs. Manley and Fischer and Manley, Burke and Fischer, LPA, then special counsel to the trustee of One Westminister and counsel to petitioner, fashioned an agreed order which partitioned the remaining fund of money into three segments.

One portion was delivered to the trustee in bankruptcy, Peter J. Walsh, Esq., in Wilmington, Del. One portion was delivered to the First National Bank of Dayton, Ohio, a purported lien claimant, and one portion was delivered to former counsel for petitioner.

Upon learning of the agreed order, which was contrary to the instruction of petitioner to his counsel, petitioner filed a motion for relief under the Ohio rule of civil procedure. The Court of Common Pleas affirmed the agreed order, stating that petitioner was bound by the agreed order of his counsel, irrespective of his wish and that the order must stand as entered. The court touched on the subject of the subsequent and possible remedy of petitioner for a misconduct of this

nature. As this court is aware in *William Kuntz, III, vs. Society Bank, N.A.*, case No. 90-1023, now pending before this honorable court, petitioner's former counsel delivered the third portion to petitioner via Federal Express a private courier company. In May, 1989 special counsel to the trustee, Mssrs. Manley and Fischer, and Manley, Burke and Fischer, LPA, appearing in the United States Bankruptcy Court in Delaware, made an application for some $56,000 in compensation and reimbursement with regards to the City of Dayton, Ohio vs. William Kuntz, III, matter. At that time, fee applicants demonstrated that they had been engaged by the trustee under 11 U.S.C. 327 and that among other things petitioner had made a payment to the applicants prior to the depositing of the jury award and bond by the City of Dayton, Ohio in June of 1987 of $20,000.

Upon review and deliberation and objections by the trustee and petitioner which were considered by the court, the court approved the reduced amount of $47,000. Upon the request of fee applicants and without objection of petitioner, the trustee paid over the sum awarded. Petitioner took an appeal and upon hearing in the United States District Court in *Re One Westminister Co., Inc.*, Case No. 89-00281, the District Court affirmed the award noting at length the application by Judge Balick of the Nucorp Doctrine with allowance for award for fee preparation etc. etc. Petitioner took that to the Third Circuit (*Re One Westminister Co., Inc.*, Case No. 90-3442) and the court ruled on that on December 21, 1991. It is anticipated that that matter will come before this court within a few weeks.

Subsequent to the fee hearing and award in Delaware and while the appeal was being considered in Ohio on the agreed order of distribution, Mssrs. Manley and Fischer, and Manley, Burke and Fischer, LPA, made a motion to amend the order of distribution. Among other things repre-

sented to that court by affidavit, was that the check in question representing the third portion remained uncashed and as a result the court had the opportunity and duty to enforce the attorney's charging lien. In July, 1989 while the District Court in Delaware was considering the appeal of the award of the fee from Bankruptcy Court which had been paid over to the fee applicants. Manley, Burke and Fischer, LPA, filed suit against petitioner seeking in addition $51,000 over and above the $20,000 already paid by petitioner to the fee applicants and in addition to the $47,000 awarded and paid in Delaware.

In September, 1989 while the original order of distribution was still on appeal, the Honorable Judge Brown of the Common Pleas Court of Montgomery County, Ohio ruled upon the charging lien of Manley, Burke and Fischer, LPA and allowed them to hold apart the additional sum of $51,000 pending the outcome of the appeal pending in Delaware. The following day, Manley, Burke and Fischer, LPA dismissed the action which had been filed in Common Pleas Court. It may be useful for this court to note, that while alleging that a 'contract' existed between petitioner and the fee applicants, no copy of said contract bearing petitioner's signature has ever been produced by the fee applicants.

Petitioner then took an appeal to the Court of Appeals of Montgomery County, Ohio and having been denied there, filed a motion in the Supreme Court of Ohio which was denied Dec. 5, 1990.

ARGUMENT

In reviewing the applicable case law, petitioner was able to only find one case which in any respect closely resembles the facts of this case. In *Re Tarricone, Inc.*, 76 B.R. 53 Bankruptcy Court, S.D.N.Y., 1987, Schwartzberg, B.J. That

court held that the attorney's charging lien was valid. However, in that case the lien sprang into existence prior to the intervening bankruptcy case. Here special counsel to the trustee and former counsel to petitioner was engaged pursuant to 11 U.S.C. 327 after the commencement of the bankrupcty case. Further former counsel to the petitioner only began to assert the existence of the charging lien, after the funds began to dissipate first by the unauthorized removal of the $100,000 cash bond by the City of Dayton, Ohio and then after both the parceling out of the remaining funds, the hearing in the Bankruptcy Court and the payment by the trustee of $47,000 to the fee applicants.

It is clear that at this point in time, the fee applicants are over secured in the charging lien by some $27,000 plus interest. When the bankruptcy determination, if upheld by this court becomes final, the fee applicants will be under the obligation to return to petitioner the oversecured portion held under the lien. If not, petitioner will undoubtedly have to resort to a fresh proceeding in the District of Delaware under 11 U.S.C. 329 to recover the excess in funds which the fee applicants are holding. There is both ample statutory authority and case law to force the fee applicants to disgorge the oversecured amount.

The central question before this court is whether an attorney, who undertakes representation under 11 U.S.C. 327, who partitioned and released portions of the funds after the cash bond which was available for his "compensation and costs" as discussed with staff counsel for the United States trustee was removed by the law director of the City of Dayton, Ohio may assert a 'charging lien.'

It is clear that the fee applicants delivered the portion of funds to petitioner and that as the court may see from the pleadings in the Society Bank petition that some back room arm-twisting was required perhaps by the Honorable Judge

Brown to compel the Society Bank to produce a fund of money sufficient to fund the claimed lien.

The concept of a charging lien in the context of a bankruptcy engagement under 11 U.S.C. 327 has no statutory foundation under Congress's redrafting of the Bankruptcy Act. That as in this case, counsel who had accepted engagement should not be permitted to make an end run around the determination of the Bankruptcy Court and seek additional compensation in a State Court forum. This would defeat the purpose of the court fixing compensation and is the reason that 11 U.S.C. 329 was passed into law.

Petitioner would therefore respectfully request the court grant the petition to consider the question.

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Appendix A—Decision of the Supreme Court of Ohio, Dated December 5, 1990.

THE SUPREME COURT OF OHIO

1990 TERM

To wit: December 5, 1990

City of Dayton, Ohio, *et al.*,

Appellees,

v.

William Kuntz, III, *et al.*,

Appellants.

Case No. 90-1563

Entry

Upon consideration of the motion for an order directing the Court of Appeals for Montgomery County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $40.00, paid by William Kuntz.

(Court of Appeals Nos. CA11870 & CA11922)

THOMAS J. MOYER
Chief Justice

Appendix B—Decision of the Supreme Court of Ohio, Dated December 5, 1990.

THE SUPREME COURT OF OHIO

1990 TERM

To wit: December 5, 1990

City of Dayton, Ohio, *et al.*,

Appellees,

v.

William Kuntz, III, *et al.*,

Appellants.

Case No. 90-1563

Entry

This cause is pending before the Court on the filing of a motion for an order directing the Court of Appeals for Montgomery County to certify its record. Upon consideration of appellant's motion to require proper service or alternatively, to strike memorandum opposing jurisdiction,

IT IS ORDERED by the Court that said motion to require service be, and the same is hereby, denied.

THOMAS J. MOYER
Chief Justice

Appendix C—Motion for Leave to Appeal/Certify the Record From the Court of Appeals of Montgomery County, Ohio—Second District.

IN THE

SUPREME COURT OF THE STATE OF OHIO at COLUMBUS, OHIO

CITY OF DAYTON, OHIO,
Plaintiff-Appellee,

VS.

WILLIAM KUNTZ, III,
Defendant-Appellant.

90-1563

Filed Aug 17 1990
Marcia J. Mengel, Clerk
Supreme Court of Ohio

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August 14, 1990

TABLE OF CONTENTS.

Page

Table of Contents & Cases and Authorities 2c
Propositions of Law 1-5 ..... 4c
Statement of Facts 5c
Argument 8c
Certificate of Service 11c

TABLE OF AUTHORITIES AND CASES CITED *

City of Dayton, Ohio vs Kuntz 88-786 Ohio Supreme Court 5c
City of Dayton, Ohio vs Kuntz 89-1696 Ohio Supreme Court 7c
One Westminister Co., Inc. United States Bankruptcy Court Delaware (83-14) 5c
One Westminister Co., Inc. United States District Court Case 89-281 ..... 8c
One Westminister Co., Inc. United States Court of Appeals for the 3rd Circuit—Case 90-3442 .. 6c
Society Bank, NA vs Kuntz Case 90-1003 Ohio Supreme Court 6c
Society Bank, NA vs Kuntz Case 89-3472 Montgomery County Common Pleas 6c
Walcutt vs Huling 5 Ohio App 326, 331-32 (1913) aff'd 92 Ohio St. 518, 112 N.E. 1087 (1915) . 8c

AUTHORITIES

Taxation of Counsel's Fees English Pleading, Evidence and Procedure Archbold's 41 Edition Sweet & Maxwell London, 1982 ..... 10c

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* also includes a reference going toward Fox & Associates Co. vs Purdon Ohio Sup Ct 88-1035

PROPOSITION OF LAW #1

That the Court of Common Plea's is without jurisdiction to entertain a motion to modify a final order which has been subject to an appeal and while that appeal is pendant.

PROPOSITION OF LAW #2

That the use of court assisted 'attorney's charging lien' is an extrodinary assistance and can only be implemented where the result would be not-payment of any compensation to be held by an attorney pending the resolution of the actual fee due the attorney.

PROPOSITION OF LAW #3

The use of an 'attorney charging lien' is an equitable device and cannot be used to circumvent the application of a statutory proceeding under the bankruptcy act to enhance fees and compensation which have been otherwise disallowed.

PROPOSITION OF LAW #4

That the 'attorney charging lien' is an equitable device which allows the segregation of funds under the code of professional responsibility until a determination is made of the exact amount due a professional.

PROPOSITION OF LAW #5

That the bond of the municipal corporation posted in an action for eminent domain if withdrawn without proper state court order remains under the exclusive jurisdiction of the bankruptcy court wherein leave was obtained to bring the state court action from the bankruptcy court.

STATEMENT OF THE FACTS ON THIS APPEAL

This is an Appeal from the Order of the Common Pleas Court of Montgomery County, Ohio entered on September 22, 1989 amending an order of distribution with regards to an action by the City of Dayton to take a property in downtown Dayton, Ohio commonly known as the Alladin Cleaners (44 W. Third Street) for the Arcade Square II Tower Project.

The order of amended distribution was sought upon the Affidavit of Robert Manley, former counsel of appellant under the color of the attorney's charging lien.

Appellee-City of Dayton, Ohio brought an action in the Common Pleas Court of Montgomery County, Ohio after seeking leave of the United States Bankruptcy Court in the District of Delaware at Wilmington due to the fact that one of the property owners was a Delaware Corporation in chapter 11 bankruptcy proceedings (83-14).

Upon the bringing of that action, the trustee of the One Westminister Co., Inc. debtor in Chapter 11, who was Peter J. Walsh, engaged Mr. Manley and Manley Burke and Fisher under Section 327 of the Bankruptcy Act (11 USC 327).

After considerable litigation which included reviews at all possible levels including the case that was presented before this court (Case 88-786) the position of the City of Dayton, Ohio was upheld on the valid exercise of its power of Eminent Domain in seeking the development of downtown Dayton, Ohio with a 30 story office tower complex (Arcade Square II).

At about that point in time, there was a fund of money on deposit with the First National Bank of Dayton, Ohio via the Office of the Clerk of Courts of Montgomery County, Ohio a fund of about $350,000.00. Before the ultimate end of appellate review the appellee, City of Dayton, Ohio removed without court order some $113,000.00 of the fund

which had been a performance bond posted for 'compensation and costs.'

Of the remaining funds, an agreed order was submitted by counsel for appellant and counsel for First National Bank of Dayton, Ohio which claimed an interest in the portion of the funds by virtue of a judgment against the appellant, William Kuntz, III.

Notwithstanding that the city of Dayton, Ohio had sought to appropriate the undivided 1/2 interest of defendant-appellant Kuntz with that 1/2 undivided interest of defendant One Westminister Co., Inc., the order fashioned by counsel for First National and appellant's former counsel provided that 'defendant Kuntz and One Westminister each own an individual one-half interest in the fee appropriated and each entitled to one-half of the fund . . .'.

Based upon the representation of counsel, that order was approved on February 9, 1989. And accordingly three checks were issued, one check to the trustee, one check to First National Bank and one check to appellant.

The third check was made payable to 'William Kuntz, III and his attorney, Robert E. Manley', that check was delivered to Mr. Manley. On Feb. 10, 1989 that check in turn was delivered to appellant, William Kuntz, III in Albany, NY.

The events surrounding that check are currently pending in common pleas court on Montgomery County, Ohio in case 89-3472 *Society Bank, NA vs. Kuntz* and before this court in case 90-1003.

On May 8, 1989 Mr. Manley and his firm, Manley Burke and Fisher made a fee application before the Honorable Judge Helen S. Balick, United States Bankruptcy Judge for the District of Delaware at Wilmington. The court heard the fee application and awarded a sum of $47,689.47 out of an application of $54,918.16. The court further disallowed appellant a credit of $20,000.00 of payments already made to the Manley firm. At that point in time and upon the

payment of the fee awarded by the trustee Peter J. Walsh, Esq. the Manley firm held funds in the amount of $67,689.47 (pg. 11-13).

After receipt of the payment from the trustee, the Manley firm returned to Dayton and presented an amended application to Judge Brown of the Common Pleas Court of Montgomery County, Ohio. That application sought an additional sum of money in the amount of $51,101.21.

At that time the original order which was made in early 1989 was on appeal to the Court of Appeals for Montgomery County, Ohio.

The basis for that motion to modify or amend the original order was based upon (2) essential elements. First that as the check in question had not been cashed, the court still had jurisdiction over the funds and second that not withstanding the fact that Mr. Manley had delivered the check to his client he was entitled to an attorney's charging lien.

On September 22, 1989 while an appeal was being taken up to this court (Case 89-1696 docketed 9.28.89-dismissed 11.16.89) Judge Brown entered an order amending his original order of early 1989.

That order was subject to an appeal to the Court of Appeals of Montgomery County, Ohio and the order of Judge Brown upholding the Manley lien pending an actual determination of the exact amount due by the United States District Court in the District of Delaware on the appeal from the bankruptcy court order of the one/half due from Kuntz. In its order affirming the lien, it would appear that the Court of Appeals in Dayton is in a state of confusion as to the true amount of money presently being held by the Manly firm (Case 83-14 Delaware).

While the opinion of the Honorable Judge Roth-United States District Judge for the District of Delaware does not clearly address the fact of payment the order of the bankruptcy court and the transcript of July 5, 1990 filed with the

Court of Appeals on reconsideration clarifies the matter (89-281 & 90-34).

ARGUMENT

To the best of appellant's knowledge, the statutory law of Ohio on Eminent Domain does not provide for the award of attorney's fees to the prevailing party. Nor is there a statutory scheme providing for the existence of 'attorney charging liens'.

To quote the brief of Mr. Fisher in the Court of Appeals with regards to the charging lien 'this motion is to enforce the charging lien of counsel, to prevent the manifest injustice created by the refusal of one payee to endorse the distribution check . . .'

As the court sees in the case 90-1003 (Society Bank, NA vs. Kuntz) the allegation is made that Kuntz *did* cash the check in question, yet Mr. Manley upon his affidavit swore to Judge Brown that the check at the time of the motion was 'uncashed'.

The purpose of an attorney's charging lien is to prevent manifest unfairness to the attorney so that 'party should not run away with the fruits of the cause without satisfying the legal demands of his attorney by whose industry and, and in many instances, at whose expense, those fruits are obtained' *Walcutt vs. Huling*, 5 Ohio App. 326, 331-32 (1913) aff'd 92 Ohio St. 518, 112 N.E. 1087 (1915).

However this is not the case here. The Manley firm was engaged by both the trustee of the Westminister Estate and by appellant Kuntz. The Manley firm received $20,000 in payment by Kuntz. Upon application to the bankruptcy court and upon a fee hearing the Manley firm received a payment of an additional sum of $47,689.47. As the court may see, this fee was duly appealed to the United States District Court in Delaware. That court affirmed the fee award in the reduced amount of $47,689.47 from the origi-

nal applied amount of $54,918.16. That is now properly on appeal to the United States Court of Appeals for the Third Circuit in Philadelphia Cases 89-281 and 90-3443.

Aside from the several issues that remain to be litigated such as the missing $100,000 cash bond of the City of Dayton which will not be considered until the Manley fee appeal in the US Court of Appeals is considered which will determine the exact amount due the Manley firm in all respects, the court must consider that in this case, it was not the skill of Mr. Manley and his firm that reaped the $235,000 but rather the intrinsic value of the Alladin Cleaners (44 W. Third Street, Dayton, Ohio) real estate which brought the jury award. This was not an action for libel or some tort which might have gone without compensation. The purpose of the city of Dayton, Ohio's action was to appropriate the property and award compensation.

Indeed the bulk of the Manley fee application was in advancing those arguments which would have resulted in defeating the city of Dayton's power to obtain property for a private high rise tower. Only $12,000 or so was in fact expended in valuation. As the court may see, the bulk of the Manley fee application was for appellate review of the challenge to the city of Dayton, Ohio's power to take that property in Dayton, Ohio.

In considering the two appeals which are now before this court together (Montgomery County Court of Appeals CA 11870 & 11922) it would appear that while the Court of Appeals sustained the order of the court entered on Sept. 22, 1989 that the central question of jurisdiction of the Common Pleas Court was all-together missed. If the Manley motion, filed in May, 1989 after receipt of the $47,689.47 from the trustee in bankruptcy in Delaware is viewed as a 60B motion, then the Court of Common Pleas which amended the order was without jurisdiction to amend the order of February as that matter was proceeding to this court. Any jurisdiction that the Court of Common

Pleas might have had in considering the matter would have not been re-instated until November 16, 1989 when the 89-1696 case was dismissed.

As outlined in the pleadings below the purpose of an attorney's charging lien is to prevent 'manifest unfairness.' It is not however a devise to allow for 'an attorney's feast.'

Assuming for the purpose of this brief and memorandum, that the Court of Appeals in Philadelphia affirms the award of $47,689.47., the Manley firm is oversecured in the amount of its lien by about $26,000 pending the actual determination of the fee as fixed by the bankruptcy court which in this case acted as 'taxing master'.[1]

As this court may be aware, appellant from time to time has taken legal schooling in England. The proposition of dealing with the Manley fee presented appellant with a dilemma. Accordingly appellant resolved to allow the Honorable Judge Balick in the function of hearing the professional fee application of the Manley firm to act as taxing master. What ever portion was determined and set for the compensation for Manley and his firm on the 1/2 undivided interest in the Alladin Cleaners property would become that amount due from Knutz on the 1/2 undivided interest.

Accordingly, that amount would now be about $95,000.00 and within the level of the missing cash bond posted by the city of Dayton, Ohio.

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[1] '. . . fees and expenses should be taxed by a . . . taxing master who should allow such fees and expenses as appeared fair and reasonable remuneration for work actually and reasonable done.' Pg 714 TAXATION OF COUNSEL'S FEES. English *Pleading, Evidence and Procedure* Archbold's 41st edition Sweet & Maxwell, London, 1982.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing and attached memo with a list of service was mailed this 16th day of August to the parties whose name appears by depositing same in a sealed wrapper in an official depository of the US Postal Service in the state of New York.

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Appendix D—Memorandum of Appellee Manley, Burke & Fischer Opposing Jurisdiction.

IN THE

SUPREME COURT OF OHIO

CITY OF DAYTON, OHIO

Plaintiff/Appellee

vs.

WILLIAM KUNTZ III *et al.*

Defendants/Appellants

Case No. 11870

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TABLE OF CONTENTS

Page

I. Table of Contents 2d

II. Table of Authorities 4d

III. Appellee's Assignment of Error 5d

A. Appellee's Proposition of Law No. 1 ..... 5d

B. Appellee's Proposition of Law No. 2 ..... 5d

IV. Statement of the Case 5d

A. Course of Proceedings 5d

B. Statement of Facts 7d

V. Argument 11d

A. Appellee's Proposition of Law No. 1 ..... 11d

First Issue Presented for Review 11d

The Court of Common Pleas correctly found that counsel for defendant Kuntz was entitled to an enforceable attorneys' charging lien on the proceeds arising from an eminent domain action 11d

1. The Court of Common Pleas Properly Applied the Doctrine of Attorneys' Charging Liens to the Facts of This Case 12d

Authorities

Cohen v. Goldberger, 109 Ohio St. 22, 141 N.E. 656 (1923) 12d

Longworth v. Handy, 2 Handy, 75 ..... 12d

Olds v. Tucker, 35 Ohio St. 581 (1880) 12d

Diehl v. Friester, 37 Ohio St. 473 (1882) 13d

Walcutt v. Huling, 5 Ohio App. 326 (1913) aff'd 92 Ohio St. 518, 112 N.E. 1087 (1915) 13d

Society Bank v. Kuntz, Bulter County, C.C.P., #89-3472 ..... 14d

2. The Amount of Attorneys' Fees Awarded to Appellee Were Supported By Facts and Evidence and Was Not Clearly Erroneous 15d

3. The Appeal Bond Posted by the City of Dayton Was Properly Withdrawn by the City When the Appeals Were Finally Resolved in Its Favor 17d

Authorities

Euclid v. Vogelin, 152 Ohio St. 538, 41 Ohio Op. 85 (1950) 17d

B. Appellee's Proposition of Law No. 2 ..... 18d

1. The Court of Common Pleas Had Jurisdiction to Enter the Orders Appealed From 18d

VI. Conclusion 18d

TABLE OF AUTHORITIES

Cohen v. Goldberger, 109 Ohio St. 22, 141 N.E. 656 (1923) 15d

Diehl v. Friester, 37 Ohio St. 473 (1882) 15d

Euclid v. Vogelin, 152 Ohio St. 538, 41 Ohio Op. 85 (1950) 17d

Olds v. Tucker, 35 Ohio St. 581 (1880) 15d

Society Bank v. Kuntz, Bulter County, C.C.P., #89-3472 ..... 14d

Walcutt v. Ruling, 5 Ohio App. 326 (1913) aff'd 92 Ohio St. 518, 112 N.E. 1087 (1915) 15d

III. APPELLEE'S ASSIGNMENT OF ERROR

A. *Appellee's Proposition of Law No. 1*

An attorney who litigates a case is entitled to be paid out of the judgment he obtains, and such an attorney has a charging lien upon such funds which may, at the discretion of the trial court, be enforced to secure payment if the client refuses to compensate the attorney.

B. *Appellee's Proposition of Law No. 2*

The filing of a notice of appeal divests the trial court of jurisdiction to act inconsistently with the appellate court's jurisdiction to review, affirm, modify or reverse the appealed judgment.

IV. STATEMENT OF THE CASE

A. *Course of Proceedings*

The petitioner herein is seeking review of two decisions of the Court of Appeals for Montgomery County, Ohio, arising out of a single eminent domain case from the Court of Common Pleas of Montgomery County, Ohio. Inasmuch as the appellant either omits to state relevant facts, misstates facts which are clearly in the record, or adds to the statement of facts references to the various other pieces of litigation in which he is involved in other courts, the appellee makes the following statement of facts based upon the record presented in this case.

This case arises out of an eminent domain action filed in the Court of Common Pleas for Montgomery County, Ohio in 1986 (T.d. 1; Case No. 86-2439). The end result of that case was a jury verdict setting the value of the property acquired by the City of Dayton, Ohio at $235,000.00. (T.d.

47). Upon appeal, the Court of Appeals affirmed the judgment in all respects. (Case No. CA10513.) Thereafter, this Court and the Supreme Court of the United States declined (January 10, 1989) to accept the case for review. (Case No. 88-786.)

Subsequent thereto, in accordance with Section 163.18 of the Ohio Revised Code, the Court of Common Pleas determined the relative interest of the various claimants to that fund, including:

1) The appellant, an individual owning a one-half interest in the real estate;

2) One Westminister Company, a corporation then in bankruptcy proceedings in Delaware, which also owned a one-half interest in the property; and

3) The First National Bank of Dayton, Ohio, by virtue of a judgment lien obtained in prior litigation unrelated to this case.

An entry and order of distribution reflecting the findings of the court was made on February 7, 1989. Checks dated February 9, 1989, were issued by the Clerk in accordance with the amounts specified in the order of the court.

On May 30, 1989, counsel for defendant Kuntz (appellee herein) filed a motion in the Court of Common Pleas to amend the order of distribution to provide that the amount of $73,145.12 previously ordered distributed in a single check made payable to both Mr. Kuntz and to his attorney, Robert E. Manley, be revised to order the clerk to issue separate checks to Mr. Manley and to Mr. Kuntz on the grounds that Mr. Kuntz had refused to endorse the previous distribution check. On June 15, 1989, the Court of Common Pleas denied the motion for amended order of distri-

bution on the grounds that the jurisdiction of the case was vested in the Court of Appeals at that time.

By decision and entry dated August 1, 1989, the Court of Appeals dismissed Appeal Nos. 11463 and 11566, thereby vesting jurisdiction once again with the Court of Common Pleas.

On August 4, 1989, counsel for Mr. Kuntz renewed its previously filed motion to amend the order of distribution.

On September 22, 1989, the Court of Common Pleas granted the motion of Manley, Burke & Fischer and amended its previous order of distribution, ordering the Clerk of Courts to separately pay Robert E. Manley the sum of $51,101.21, but directing the clerk to retain the remainder, subject to the further order of this court. On or about October 19, 1989, the defendant Kuntz filed a notice of appeal to this court from that ruling.

B. *Statement of Facts*

This case was initially filed by the City of Dayton, Ohio on August 14, 1986 in order to condemn a parcel of property in the City of Dayton for use in an urban renewal project. (T.d. 1; Complaint, p. 4.) In 1987, that case resulted in a jury determination that the value of the property was $235,000.00. (T.d. 47.) That amount was placed by the City of Dayton with the Clerk of Court, pursuant to order of the Court of Common Pleas.

During the subsequent appeals of that jury decision, the City of Dayton, Ohio posted a $100,000.00 cash bond, pursuant to order of the court, in order to take possession of the property prior to the determination of the appeals.

The Court of Appeals affirmed the prior litigation in all respects. (Case No. CA10513.) Subsequently, this Court and the Supreme Court of the United States declined to accept the case for review. (Case No. 88-786.) Thereafter, all appeals as to the valuation and the right to take having

been determined in favor of the City, the $100,000.00 cash bond was no longer required and thus was withdrawn by the City. The jury award of $235,000.00, plus accumulated interest, remained with the Clerk of Court, pending an order of distribution.

Pursuant to Section 163.18 of the Ohio Revised Code, the Court found (Order of Distribution, February 7, 1989) that the real property was owned one-half by One Westminister Company and one-half by appellant Kuntz. The Court also found that the First National Bank of Dayton, Ohio, had a valid judgment lien against the property, which arose from unrelated litigation against Mr. Kuntz. Accordingly, the Court ordered distribution of one-half of the proceeds ($124,374.25) to One Westminister Corporation (which at that time was in bankruptcy proceedings in the United States District Court, District of Delaware). The other fifty percent of the award was first reduced by the amount of the judgment lien, which was ordered paid to First National Bank of Dayton, Ohio ($51,129.14). The remainder was ordered to be paid to "William Kuntz III and his attorney, Robert E. Manley" ($73,145.12).

The record reflects that this check was sent to Mr. Manley, who transmitted it, without first endorsing it, to Mr. Kuntz, requesting that he endorse it and return it to him so that it could then be cashed and the proceeds divided pursuant to the agreement between Mr. Kuntz and his counsel. (Manley Affidavit, p. 9.) The record reflects that Mr. Kuntz did not sign the check and return it to Mr. Manley. (Manley Affidavit, p. 9.) Upon inquiry with the office of the Court of Common Pleas, the Clerk's Office erroneously informed Mr. Manley's office that the check had not been presented for payment and that the funds ($73,145.12) remained in the account. (Manley Affidavit, p. 9.)

Despite the fact that Mr. Kuntz had made a written agreement with counsel to pay all fees as incurred and to seek reimbursement for one-half of such fees from the

Bankruptcy Court in Delaware (Manley Affidavit, pp. 2, 6), Mr. Kuntz paid only the first $20,000.00 of such fees, and then ceased to meet his obligations. (Manley Affidavit, p. 8.) Accordingly, counsel petitioned the Bankruptcy Court in Delaware for payment of fifty (50) percent of the attorneys' fees incurred and the costs expended in this litigation. (Manley Affidavit, pp. 8-9.) Testimony was presented to the Bankruptcy judge by testamentary evidence at a hearing on May 8, 1989; Mr. Kuntz was present at that hearing and participated in it. (Manley Affidavit, p. 8.) As a result of that hearing, the Bankruptcy Court directed the Trustee in Bankruptcy to pay counsel the sum of $47,689.47 from the fifty (50) percent of the proceeds of the eminent domain case which had been transmitted to the Trustee in Bankruptcy. This was done. (Manley Affidavit, pp. 8-9 and Exhibit E.)

Subsequently, still under the belief that the check dated February 9, 1989 (which was made payable jointly to Mr. Kuntz and to Mr. Manley in the amount of $73,145.12) had not been negotiated, counsel made a motion with the Court of Common Pleas of Montgomery County, Ohio on May 30, 1989, to amend the order of distribution by recognizing the validity of the attorneys' charging lien, the validity of the contractual agreement between Mr. Kuntz and his counsel, and to order cancellation of the first check and the issuance of two substitute checks, one to Mr. Kuntz and one to Mr. Manley. That motion was dismissed by the Court of Common Pleas on the grounds that the jurisdiction of the case at that time rested in the Court of Appeals.

On August 1st, the Court of Appeals dismissed consolidated Case Nos. 11463 and 11566, thereby returning jurisdiction to the Court of Common Pleas.

Accordingly, on August 4, 1989, counsel renewed its motion to amend the order of distribution. After the matter had been briefed to the Court, and upon further inquiry, the Clerk of Court learned that the $73,145.12 sum repre-

sented by the check dated February 9, 1989, was not in the account as previously believed. The clerk so advised the trial judge and counsel.

The record shows that on February 27, 1989, Mr. Kuntz negotiated (without endorsing or obtaining Mr. Manley's endorsement) the check at the Society Bank and appropriated to himself the entire $73,145.12. This fact was not disclosed by Mr. Kuntz to the Court of Common Pleas, to Society Bank, to his counsel, nor was it disclosed at the Bankruptcy Court hearing in Delaware on May 8th, although Mr. Kuntz was present. (Manley Affidavit, pp. 8-9) (The negotiation of the February 9th check is the subject of a complaint filed by the Society Bank against Mr. Kuntz to recover that amount; Case No. 89-3472, Montgomery County Court of Common Pleas. Judgment has been rendered for the plaintiff therein; Mr. Kuntz has filed an appeal.)

Because the Society Bank distributed the funds on an unendorsed check, the bank deposited an equal amount back into the Clerk of Court's account. (September 14, 1989; Account No. 800164183.)

On September 22, 1989, the Court of Common Pleas granted the pending motion to amend the order of distribution, and directed the clerk to issue counsel a check in the amount of $50,101.00, and ordered that the remainder not be distributed to Mr. Kuntz, but that it be held by the clerk pending further order of the Court, inasmuch as Mr. Kuntz had already appropriated the entire amount to himself. (Court's Order, September 22, 1989).

The facts concerning the agreement to retain counsel are contained in the affidavit of Robert E. Manley, filed in the Court of Common Pleas and can be summarized as follows. Mr. Kuntz, as joint owner of the property, and Mr. Walsh, as Trustee for the other joint owner of the property which was sought to be condemned, jointly retained Manley, Burke & Fischer to represent their interests in the condemnation

case (Case No. 86-2439). (Manley Affidavit, p. 2). Through counsel's efforts, the pretrial offer of the City to purchase the property for $67,000.00 (Complaint, p. 4) was eventually transformed into a jury award of $235,000.00.

It is important to note that the agreement to retain counsel was entered into by both Mr. Kuntz individually and the corporation which was at that time in bankruptcy proceedings. (Manley Affidavit, p. 2 and Exhibit A.) Kuntz and the corporation were each to be ultimately responsible for one-half of the attorneys' fees. The application made by counsel for payment of fees to the Bankruptcy Court, and the resulting order of the Bankruptcy Court ordering payment, was for the fifty (50) percent of fees owed by the corporation (Manley Affidavit, p. 8 and Exhibit E.). That order did not provide for payment of the fifty (50) percent of the obligation owed by Mr. Kuntz personally.

The amount owed by Mr. Kuntz personally was the subject of the motion of counsel to amend the order of distribution. That order provided for the payment of the fees which remained outstanding at that time. The appellant is in error when he suggests that the amount paid by the Trustee in Bankruptcy fully satisfied the entire matter.

V. ARGUMENT

A. *Appellee's Proposition of Law No. i*

An attorney who litigates a case is entitled to be paid out of the judgment he obtains, and such an attorney has a charging lien upon such funds which may, at the discretion of the trial court, be enforced to secure payment if the client refuses to compensate the attorney.

First Issue Presented for Review

The Court of Common Pleas correctly found that counsel for defendant Kuntz was entitled to an enforceable attor-

neys' charging lien on the proceeds arising from an eminent domain action.

The arguments of the defendant Kuntz appear to fall into three categories. First, he appears to challenge the concept of an enforceable charging lien under the circumstances of this case. Secondly, he suggests that the amount awarded was improper because counsel had already been paid fees from the Bankruptcy Court in Delaware. Finally, he suggests that the withdrawal of the appeal bond posted by the City somehow affected the validity of the charging lien. None of these arguments is well-taken, and they are discussed separately below.

1. *The Court of Common Pleas Properly Applied the Doctrine of Attorneys' Charging Liens to the Facts of This Case.*

The check for Mr. Kuntz's share of the judgment was properly made payable to Mr. Kuntz and to Mr. Manley jointly because under Ohio Law, as in virtually every jurisdiction, an attorney has a "charging lien" which attaches to any judgment obtained by him during the course of litigation. That lien is enforceable to pay the fees due him from the client arising out of that litigation. *Cohen v. Goldberger*, 109 Ohio St. 22, 141 N.E. 656 (1923). As has long been the law of this State:

> "[A]n attorney may have a claim upon the fruits of a judgment or decree which he has assisted in obtaining, or upon a sum of money which he has collected, and under some circumstances courts will aid him in securing or maintaining such claim. Thus, he will be protected in retaining his fee out of money which he has collected for his client. *Longworth v. Handy*, 2 Handy, 75. He will be protected in his claim as attorney on a fund in the hands of a receiver (*Olds v. Tucker*, 35 Ohio St. 581), or in court."

Diehl v. Friester, 37 Ohio St. 473, 477 (1882).

Unlike the "retaining lien" which attaches to documents technically owned by the client, the "charging lien" which attaches to funds created as a result of the litigation, is enforceable through equity. This has been the law in Ohio since at least 1915:

> "Besides the general or retaining lien which an attorney has upon papers, books, documents, money, and other property in his possession, to secure his professional compensation he has what is called, for want of a better name, a particular or charging lien upon a judgment procured by him for his client. . . . It is considered reasonable and proper that an attorney, by whose labor and at whose expense a judgment has been obtained for his client, should have an interest in that judgment which the law will regard and protect. An eminent judge once said 'that the convenience, good sense, and justice of the thing required it.' So, while we talk of an attorney having a lien upon a judgment, it is, in fact, only a claim or right to ask for the intervention of the court for his protection, when, having obtained a judgment for his client, he finds that there is a probability of the client depriving him of his interest in the fruits of that judgment. The lien of an attorney upon a judgment is an equitable lien, and is upheld simply upon the theory that his services and skill produced it. This seems to be the only ground upon which this lien has ever been put. Little is known of its origin, but the principle has long been recognized that a 'party should not run away with the fruits of the cause without satisfying the legal demands of his attorney by whose industry, and, in many instances, at whose expense, those fruits are obtained.' " *Wal-*

cutt v. Huling, 5 Ohio App. 326, 331-32 (1913) aff'd 92 Ohio St. 518, 112 N.E. 1087 (1915).

The enforcement of a charging lien of counsel prevents the manifest injustice created by the refusal of one payee to endorse the distribution check, and offers the Court of Common Pleas an alternative method of permitting its previous order of distribution to be carried out to the maximum extent possible.

The written agreement between the appellant and his counsel to pursue litigation and subsequent appeals was a matter of record before the trial court when it made its ruling. The basis for the enforcement of the charging lien was to provide for the proper distribution of the jury award and to prevent the client from "running away with the fruits of the cause," as *Walcutt* put it, even though, as we now know, the client had already done so. Once the new funds were re-deposited by the bank, the court properly modified its previous order to prevent, to the greatest extent possible, the recalcitrant or obstreperous client from complying with his contractual obligation to compensate counsel for successful litigation.

As noted in the statement of facts, at the time the motion was made, all parties (except appellant) were under the mistaken impression that the check transmitted from Mr. Manley to Kuntz for his signature had not been negotiated. (Manley Affidavit, p. 8.) However, prior to ruling upon the motion, the parties discovered that Mr. Kuntz had, in fact, falsely, fraudulently and without authority, negotiated the check and appropriated to himself the entirety of the $73,145.12. (See Complaint in *Society Bank v. Kuntz*, #89-3472, p.5.) For this reason, the Court of Common Pleas directed the clerk not to issue a check to Mr. Kuntz until resolution of the dispute between the Society Bank and Mr. Kuntz, which presumably will be resolved by the

litigation subsequently brought against him by the bank in Case No. 89-3472.

The Court of Appeals correctly applied the prior rulings of this court, including *Cohen v. Goldberger*, 109 Ohio St.22, 141 N.E. 656 (1923), an Ohio Supreme Court Opinion clearly recognizing the validity of the charging lien in Ohio. The attorneys' charging lien has been well recognized in Ohio since at least 1882, including *Diehl v. Friester*, 37 Ohio St. 473, 477 (1882); *Olds v. Tucker*, 35 Ohio St. 581 (1880); *Walcutt v. Huling*, 5 Ohio App. 326, 331-32 (1913), affirmed, 19 Ohio St. 518, 112 N.E. 1087 (1915).

Accordingly, having created through their efforts a fund previously unavailable to the client, the attorneys had an enforceable lien upon that amount for the payment of their fees. For these reasons, the Court of Common Pleas and the Court of Appeals were correct in ruling that counsel in this case had such a lien and that it was enforceable through the Court of Common Pleas upon the funds held by the Clerk of Court.

2. *The Amount of Attorneys' Fees Awarded to Appellee were Supported by Facts and Evidence and Was Not Clearly Erroneous.*

The appellant suggests that the amount awarded was excessive because counsel had previously been paid counsel fees arising from this litigation by order of the Bankruptcy Court in Delaware. However, counsel was retained by both the bankrupt corporation and by Mr. Kuntz personally who were joint owners of the property. (Manley Affidavit, pp. 6, 8 and Exhibit A.) The original contractual agreement was that Mr. Kuntz would pay all bills for time and expenses incurred on a month-by-month basis, and that, at the end of the litigation, he would seek reimbursement from the Bankruptcy Court for one-half of the amount which he paid to counsel. (Manley Affidavit, p. 6.) Thus, counsel was to be

paid in a timely manner and Mr. Kuntz was to assume the responsibility for being reimbursed from the bankrupt estate (this ownership of real property was the sole asset of the bankrupt estate, and Mr. Kuntz was virtually the sole creditor of that corporation).

That arrangement did not work out as planned, however. During the early stages of the litigation, Mr. Kuntz paid $20,000.00 toward the initial legal bills submitted. (Manley Affidavit, p. 8, Paragraph 17.) After that time, however, no further payments were made. (Manley Affidavit, p. 9, Paragraph 22 and Exhibit B.) When counsel inquired about this delinquency in payment, Mr. Kuntz responded that counsel should not be concerned because the written agreement for the payment of attorneys' fees provided for interest upon any unpaid balance after 30 days. (Manley Affidavit, pp. 6-7, Paragraph 14.) Confident that their efforts in the ligitation would result in a substantial fund for the payment of attorneys' fees, counsel continued in the case.

The record contains a copy of every monthly bill sent to appellant during the course of the litigation, itemizing every hour spent and every cost advanced (Manley Affidavit, Exhibit B), as well as a recapitulation by each attorney, showing the hours worked and the hourly rate (Manley Affidavit, pp. 4-5), as well as a chronological ledger sheet showing all billings and payments (last six pages of Exhibit B to Manley Affidavit). Other than suggesting that the account had been settled by the payment from the Trustee in Bankruptcy (which is simply false), appellant did not challenge the validity of the employment contract, the hours spent or the amount charged. (See Observations of William Kuntz III, contra motion of former attorneys; August 14, 1989.) For these reasons, the order of the Court of Common Pleas should be affirmed.

3. *The Appeal Bond Posted by the City of Dayton Was Properly Withdrawn by the City When the Appeals Were Finally Resolved in Its Favor.*

Mr. Kuntz refers to the bond of $100,000.00 which was posted by the City of Dayton, and suggests that the bond was improperly withdrawn. He seems to suggest that those funds were to be or should have been used to pay his attorneys' fees. A review of the record in this case indicates that this is erroneous.

The bond was posted pursuant to Section 163.19 of the Ohio Revised Code during the appeal in order to protect the property owners should they prevail on appeal. Having posted the bond, pursuant to statute, the City had the right to occupy the property and alter it; the bond was designed to be extra security should the judgment of the Court of Common Pleas be reversed or otherwise altered on appeal.

Once all of the appeals were concluded, including a petition for certiorari to the United States Supreme Court, the property owners' interest in the property was fully and finally terminated and the statutory basis for posting the $100,000.00 bond was eliminated. As described in the affidavit of Robert E. Manley, filed in the Court of Common Pleas, Mr. Kuntz has consistently acknowledged his personal obligation to compensate counsel for the services provided during the eminent domain litigation, services which resulted in a substantial jury award, well in excess of the previous offer made by the City. There is no justification in law or otherwise for suggesting now that the appeal bond was to be somehow used by appellant to pay his attorneys. Ohio has long held to the doctrine that the property owner in an eminent domain action is responsible for his own counsel fees; they are not recoverable from the other side. See, e.g.: *Euclid v. Vogelin,* 152 Ohio St. 538, 41 Ohio Op. 85 (1950).

For these reasons, the arguments advanced by appellant arising out of the posting or the withdrawal of the appeal bond by the City of Dayton, Ohio are not well taken.

B. *Appellee's Proposition of Law No. 2*

The filing of a notice of appeal divests the trial court of jurisdiction to act inconsistently with the appellate court's jurisdiction to review, affirm, modify or reverse the appealed judgment.

1. *The Court of Common Pleas Had Jurisdiction to Enter the Orders Appealed From.*

To the extent that the appellant suggests review of the jurisdiction of the Court of Common Pleas (see "Proposition of Law #1, not addressed in appellant's argument) the appellant is seeking review of the decision of the Court of Appeals below in Case #11922.

Both the relevant facts and the well-settled law are stated clearly and succinctly in the opinion of the Court of Appeals (copy attached) and need not be repeated here. Suffice it to observe that the proposition of law as stated by appellant cannot be supported by the facts of this case as the Court of Common Pleas refused to rule upon the motion filed until the pending appeal was dismissed, thereby returning jurisdiction to the Court below. There does not seem to be an issue here.

VI. CONCLUSION

The Court of Common Pleas was under a duty to provide for the proper distribution of the jury award (Section 163.18 of the Ohio Revised Code), which award was deposited with the clerk for distribution to the parties to the litigation in accordance to their "respective interest." With

the exception of the check made payable to Mr. Kuntz and Mr. Manley, all of that was accomplished pursuant to the order of distribution and the checks issued by the clerk thereto.

The courts of Ohio have repeatedly recognized the validity of the attorneys' charging liens in situations similar to this in order to prevent a client from avoiding his contractual and equitable obligations to compensate counsel for successful litigation. The ruling by the Court of Common Pleas finding that such a lien existed and enforcing it was in accordance with a long line of Ohio cases and was not error, and the affirmance by the Court of Appeals similarly applied well-settled law to undisputed facts.

Furthermore, by distributing the funds which remained in the custody of the clerk, the Court of Common Pleas completed its obligation to distribute the funds without prejudicing the rights of any of the other parties thereto. Finally, the Court of Common Pleas directed the clerk to retain the remainder, which would otherwise be distributed to appellant personally, pending resolution of the questions presented by his unauthorized negotiation of the check issued jointly to him and to Mr. Manley. For these reasons, there was no error in the proceedings below, and the motion of appellant should be denied.

Respectfully submitted,

TIMOTHY A. FISCHER
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225 West Court Street
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

OF COUNSEL:

Manley, Burke & Fischer
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing is being mailed to all parties entitled to service under Rule II, Section 5, Ohio Supreme Court Rules of Practice, on the 12 day of September, 1990.

Timothy A. Fischer

SERVICE LIST:

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8128H/kjh

Appendix E—Notice of Appeal to the Supreme Court of Ohio

IN THE

COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO
SECOND APPELLATE DISTRICT

CITY OF DAYTON, OHIO

Plaintiff-Appellee

VS.

WILLIAM KUNTZ, III, ET AL.

Defendant-Appellants

Case CA No. 11870, 11922

PLEASE TAKE NOTICE, that the above named Defendant, William Kuntz, III hereby appeal(s) to the Supreme Court of Ohio sitting at Columbus, Ohio from the opinion, decision and entry of the Court of Appeals of Montgomery County, Ohio Court in this action, entered in the office of the Clerk of said Court on and after the 13th of June, 1990 final entry on or about June 26, 1990. This case involves a substantial question of public interest and from each and every part thereof.

Dated: June 27, 1990

Yours, etc.,

WILLIAM KUNTZ, III
Box 1722-Broadway Station
Albany, NY 12201-1722
518-962-4966

Appellant

CERTIFICATE OF SERVICE OF THE NOTICE OF APPEAL

I hereby certify that a copy of the foregoing notice of appeal was mailed US Mail postage prepaid by depositing same in a sealed wrapper addressed to the parties who appear on the attached list on this 16th day of July, 1990 by depositing same in an official depository of the US Postal Service within the State of New York.

WILLIAM KUNTZ, III

Appendix F—Opinions from the Court of Appeals of Montgomery County

IN THE
COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

CITY OF DAYTON, *et al.*,
Plaintiffs-Appellees,

against

WILLIAM KUNTZ, III,
Defendant-Appellant.

Case No. 11870
(C.P. No. 86-2439)

OPINION

Appeal considered on the 29th day of May, 1990.
Decision rendered on the 13th day of June, 1990.

TIMOTHY A. FISCHER, Manley, Burke & Fischer, 4100 Carew Tower, Cincinnati, Ohio 45202, Attorney for Plaintiffs-Appellees

WILLIAM KUNTZ, III P.O. Box 1722 Broadway Station, Albany, New York 12201-1722, Defendant-Appellant *Pro Se*

GRADY, J.:

William Kuntz appeals the trial court's decision granting his former attorney, Robert Manley, fees from judgment he obtained while representing Kuntz. The trial court concluded, on the authority of *Cohen v. Goldberger* (1923), 10 Ohio St. 22, that Manley had a valid "charging lien" against the judgment and ordered that he receive approximately $51,000 of a $73,000 judgment as compensation for his services. Kuntz presents several arguments against the trial court's decision, the essence of which challenge the existence in law of a charging lien and question the sufficiency of the evidence supporting the trial court's decision. For the reasons explained below, we affirm the decision of the trial court.

The relevant facts of this case are straightforward. Kuntz retained Manley to handle a condemnation action brought by the City of Dayton against property owned by Kuntz and another party in downtown Dayton. As a result of Manley's efforts, Kuntz was ultimately awarded $123,374.25 of which he received $73,145.12.*

Pursuant to the trial court's order of distribution, the Clerk of Courts issued a check to Manley made out jointly to "William Kuntz, III and his attorney, Robert E. Manley." Manley sent the check to Kuntz with an instruction that he endorse it and return it to Manley. Upon receipt of the check, Manley was himself to endorse the check, deposit it in an appropriate account, and withdraw his fees. The remaining balance would then be sent to Kuntz.

However, Kuntz returned the check unendorsed and further refused to pay on his account. Manley filed a motion to amend the order of distribution, asking the trial court to order that he be separately paid out of the proceeds of the judgment he obtained for Kuntz. The trial court initially

*Kuntz's award was reduced by approximately $51,000 because of a prior unrelated judgment lien held by the 1st National Bank.

dismissed the motion because the case was an appeal to this court. We dismissed the appeal and Manley renewed the motion to amend the order of distribution. The trial court granted the renewed motion and amended the order of distribution ordering the Clerk to pay Manley separately $51,101.23 of the judgment.

Kuntz filed a timely notice of appeal presenting one assignment of error which states:

> The court of common pleas did commit error when it upheld the renewed motion for a charging lien by the former attorney (*sic*) for defendant-appellant against the portion of the funds from the prior judgment (*sic*) of the court.

Ohio has long recognized that an attorney who successfully litigates a case is entitled to be paid out of the judgment he obtains. See, *Cohen, supra; Poor v. Huntington Natl. Bank* (1986), 27 Ohio App.3d 76; *Howard v. Cleveland* (1964), 95 Ohio Op.2d 500. Cr., *In re Estate of Teopas* (1960), 116 Ohio App. 506. The so called "charging lien" attaches to a judgment and "rests * * * on the equity of an attorney to be paid his fees and disbursements out of the judgment which he has obtained * * * (because) his service and skill produced the judgment * * *." *Cohen, supra,* at 27. Consequently, an attorney may recover any fees due him out of the proceeds of a judgment if a client refuses to compensate the attorney as previously agreed to be by the parties. *Id.*

Appellate courts generally will not disturb the judgment of a trial court absent a showing that it is manifestly against the weight of the evidence. As pointed out in *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80:

> * * * an appellate court should not substitute its judgment for that of the trial court where there exists . . . *competent credible evidence supporting the*

> *findings of fact and conclusions of law rendered by the trial judge.* (Emphasis supplied).

See, also, *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279; *Huffman v. Huffman* (June 23, 1989), Greene App. No. 88-CA-101, unreported.

After reviewing the record, we find that the trial court acted properly in amending its order of distribution to allow Manley to recover his fees out of the proceeds of the judgment. Manley had a charging lien against the judgment for payment of his fees. See, *Cohen, supra.* Thus, the only questions before the trial court were (1) whether Kuntz had violated his agreement with Manley and (2) the extent of the arrearage of his account, if any.

The record fully supports the trial court's conclusion that Kuntz violated the terms of his representation agreement and had fallen in arrears on his account. Further, Manley supplied the court with a very thorough affidavit containing a detailed explanation of the representation agreement between the parties as well as copies of itemized statements indicating that Kuntz owed Manley approximately $51,000. Kuntz offered nothing to contradict this evidence.

Based on the record before us, we conclude that the trial court's decision to amend the order of distribution is supported by competent, credible evidence. Appellant Kuntz's single assignment of error is overruled and the decision of the trial court is affirmed.

WOLFF, P.J., and WILSON, J., concur.

Copies mailed to:

Timothy A. Fischer, Esq.
William Kuntz, III
Hon. Robert M. Brown

IN THE

COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

CITY OF DAYTON, *et al.*
Plaintiffs-Appellees

vs.

WILLIAM KUNTZ, III
Defendant-Appellant

Case No. 11922
(C.P. No. 86-2439)

OPINION

Appeal considered on the 30th day of May, 1990.
Decision rendered on the 13th day of June, 1990.

TIMOTHY A. FISCHER, Manley, Burke & Fischer, 4100 Carew Tower, Cincinnati, Ohio 45202, Attorney for Plaintiffs-Appellees

WILLIAM KUNTZ, III, P.O. Box 1722 Broadway Station, Albany, New York 12201-1722, Defendant-Appellant *Pro Se*

GRADY, J.,

This appeal arises from the trial court's decision dismissing Appellant William Kuntz's Civ.R. 60(A) & (B) motion for relief from judgment. Kuntz filed the motion on October 20, 1989. However, prior to that, on October 19, 1989,

Kuntz filed a notice of appeal with this court seeking review of the trial court's order that Kuntz's former attorney receive payment of his fees out of a judgment award as provided by *Cohen v. Goldberger* (1921), 109 Ohio St. 22. The trial court held that the filing of the notice of appeal vested jurisdiction over the case in the Court of Appeals and thus it was without jurisdiction to entertain Kuntz's motion. We agree.

The general rule in Ohio concerning the jurisdiction of a trial court *after* an appeal is taken from a final decision is set out in *State, ex rel. Special Prosecutors v. (illegible)* (1978), 55 Ohio St. 2d 94, 97, wherein the Supreme Court stated:

> * * * The general rule or law is that *the trial court loses jurisdiction to take action in a cause after an appeal has been taken and decided.* (Emphasis supplied)

See, also, *State v. McGettrick* (1988), 40 Ohio App.3d 25, 33 ("The filing of a notice of appeal divests the trial court of jurisdiction to act inconsistently with the appellate court's jurisdiction to review, affirm, modify or reverse the appealed judgment.").

The record shows that Appellant Kuntz filed a notice of appeal on October 19, 1989. As of that date, jurisdiction over the issues raised by the trial court's order vested with this court. Appellant Kuntz's Civ.R (illegible) properly dismissed for want of jurisdiction. See, *State, ex rel. Special Prosecutor, supra.*

The decision of the trial court is affirmed in all respects.

WOLFF, P.J., and WILSON, J., concur.

Copies mailed to:

Timothy A. Fischer, Esq.
William Kuntz, III
Hon. Robert M. Brown

Mailed To Clerk's Office on July 26, 1990.

IN THE

COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

CITY OF DAYTON
Plaintiff-Appellee

vs.

WILLIAM KUNTZ, III
Defendant-Appellant

Case No. 11870
11922

DECISION AND ENTRY

Rendered on the 30th day of July, 1990.

TIMOTHY A. FISCHER, 4100 Carew Tower, Cincinnati, Ohio 45202, Attorney for Plaintiff-Appellee

WILLIAM KUNTZ, III, P.O. Box 1722 Broadway Station, Albany, New York 12201-1722, Defendant-Appellant *Pro Se*

PER CURIAM:

This matter is before the court on a motion by Defendant-Appellant William Kuntz, III, requesting that we reconsider two decisions, *Dayton v. Kuntz* (June 13, 1990). Montgomery App. No. 11870, unreported, and *Dayton v. Kuntz* (June 13, 1990), Montgomery App. No. 11922, unreported.

Kuntz first argues that the trial court was not deprived of jurisdiction to consider a Civ. R. 60(B) by the filing of a notice of appeal. However, as we noted in our prior decision, "the trial court loses jurisdiction to take action in a cause after an appeal has been taken(.)" *Dayton v. Kuntz* (June 13, 1990), Montgomery App. No. 11922, unreported, citing, *State, ex rel, Special Prosecutors v. Judges* (1978), 55 Ohio St. 2d 94, 97. Kuntz's first proposition is accordingly without merit.

Kuntz next argues that a portion of the attorney fees due the law firm of Manley, Burke & Fischer were ordered paid in a memorandum opinion of the United States District Court for the District of Delaware, *In Re One Westminister*, No. 89-281-JRR (D. Del. filed June 7, 1990). However, that opinion did not order payment of any fees and Kuntz fails to provide any other evidence, beyond bare assertions, that a portion of the fees were in fact paid. Kuntz's second proposition is equally without merit.

Appellant Kuntz's motion for reconsideration is denied.

WILLIAM WOLFF, JR.
PRESIDING JUDGE

RICHARD K. WILSON, JUDGE

THOMAS J. GRADY, JUDGE

Copies mailed to:

Timothy A. Fischer, Esq.
William Kuntz, III
Honorable Robert N. Brown

Appendix G—Application Under Rule 26 for Reconsideration.

IN THE

COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO—SECOND APPELLATE DIST.

CITY OF DAYTON, OHIO, *et al.*

Plaintiff-Appellees,

vs

WILLIAM KUNTZ, III, *et al.*

Defendant-Appellants.

CA No. 11870
11922

Now comes defendant-appellant, William Kuntz, III appearing pro se of Albany New York and respectfully requests the court reconsider it's opinion in the above captioned case number's which together treat the application and effect of the charging lien of Robert E. Manley and Manly Burke and Fisher, LPA the former trial counsel in the above captioned matter.

Defendant-appellant has caused copies of the express-mail labels which delivered to the clerk of courts for filing the Rule 60 motion to indicate that in fact the motion was delivered to the clerk prior to that date when the Notice of

Appeal was delivered by two days prior to it's docketing. Defendant-appellant would submit that this court should take judicial notice of such an error and accordingly amend it's decision to reflect this.

The question of the jurisdiction of the trial court to enter an order to amend the order of distribution is treated obliquely. If the trial court was without jurisdiction to review the (60) motion filed by defendant-appellant aside from the error in docketing, how may the trial court have exercised any jurisdiction under the Manley motion to set aside funds under the charging lien?

The resolution of the actual fee determination was on appeal before the United States District Court in Wilmington, Delaware.

The record of the case indicates that the matter having been dismissed by the Court of Appeals which ruled in the last months of the summer of 1989 was then on appeal to the Supreme Court of Ohio. If this court is to uphold the threshold of limits of trial court jurisdiction, then it is clear that at the time the Manley motion was granted to hold apart the funds, that the trial court did *not* in fact have jurisdiction.

In order that this court may consider the exact nature of the proceeding in Delaware, defendant-appellant has appended the memorandum opinion of the United States District Court for the District of Delaware *In Re: One Westminister Co., Inc.* Case Civil Action No. 89-281-jrr together with the order dated June 7, 1990 in which the Honorable Judge Jane Roth considered at length the fee application of Manley, Burke and Fisher.

As the court may see, the fee award of $47,689.47 was upheld (pg 4) as the court may further see, the $20,000 payment by William Kuntz, III was allocated to the Kuntz 50/50 portion of the Manley fee application. (pg 8) Accordingly when Judge Brown allocated the $51,101.21 to be held by the Manley firm pending the actual deter-

mination of the fee due by the United States District Court, the lien amount did not allow credit for the $20,000 already paid and exceeded the award by Judge Balick by the difference between the $47,689.47 and the $51,101.21.

Accordingly and in this courts work and words in this case it must be clear that the charging lien allowed by Judge Brown aside from the other defects apportion some $25,000 in excess of what was in fact required.

As the court may be further aware, this $51,101.21 plus the $20,000 paid by defendant-appellant plus the $47,689.47 paid by the trustee exceeds the actual determination of the fee award as reviewed by the District Court in Delaware.

Accordingly it would be in the interests of judicial economy for this court to remand the matter to the trial court for a reduction in accordance with the District Court's order and memorandum and in accordance with the code of professional responsibility DR9-102 A(2).

Funds belonging in part to a client and in part presently or potentially to a lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

Accordingly if and when the actual determination of the fee award which may now go to the United States Court of Appeals for the Third Circuit is resolved the extra $25,000 lays in limbo land.

As a brief aside, as the court is aware the City of Dayton, Ohio asked to be dismissed from these two appeals and the court granted that request. Contained in the city's request was a 'treatment' of the issue of the $100,000 cash bond.

It is and has been the position of the defendant-appellant that the issue of the bond, and the actual determination of the City of Dayton, Ohio liability to the defendant-appellant together with the liability to One Westminister Co., Inc.

is before the United States Bankruptcy Court where the City of Dayton, Ohio did appear in order to have the automatic stay lifted in order to commence this action.

If any when the actual and final determination of the Manley fee award is concluded under the federal appeal, if it is upheld at the reduced amount of $47,689.47 x 2 = $95,378.94 (1/2 Kuntz/1/2 One Westminister) this will be within the amount posted by the City of Dayton, Ohio for 'compensation and costs'. In so far as the best pre-litigation offer of the city was $67,000.00 and that the jury award was $235,000.00 there is a clear basis to conclude that the City of Dayton, Ohio sought the Alladin Cleaner property thru negotiations in bad faith. Accordingly under the federal standards for fee awards in so far as defendant-appellant is the prevailing party, an application for a surcharge or in the alternative an adversary proceeding against the City of Dayton, Ohio may be required.

Such a matter has been pendant since July 27, 1988 in the United States Bankruptcy Court for the District of Delaware. (Copy attached)

Accordingly and respectfully submitted,

WILLIAM KUNTZ, III
Defendant-Appellant
Box 1722—Broadway Station
Albany, NY 12201-1722
518-962-4966

CERTIFICATE OF SERVICE OF THE APPLICATION

I hereby certify that a copy of the foregoing was mailed US mail postage prepaid by depositing same in a sealed wrapper address to Mssrs. Manley and Fisher, 4100 Carew Tower, Cincinnati, Ohio this 23rd of June, 1990.

WILLIAM KUNTZ, III

Appendix H—Decisions and Entry of Court of Appeals on Reconsideration, Dated July 30, 1990, and September 7, 1990.

Mailed To Clerk's Office on July 26, 1990.

IN THE

COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

CITY OF DAYTON
Plaintiff-Appellee

VS.

WILLIAM KUNTZ, III
Defendant-Appellant

Case No. 11870
11922

DECISION AND ENTRY

Rendered on the 30th day of July, 1990.

TIMOTHY A. FISCHER, 4100 Carew Tower, Cincinnati, Ohio 45202, Attorney for Plaintiff-Appellee

WILLIAM KUNTZ, III, P.O. Box 1722 Broadway Station, Albany, New York 12201-1722, Defendant-Appellant *Pro Se*

PER CURIAM:

This matter is before the court on a motion by Defendant-Appellant William Kuntz, III, requesting that we reconsider two decisions, *Dayton v. Kuntz* (June 13, 1990). Montgomery App. No. 11870, unreported, and *Dayton v. Kuntz* (June 13, 1990), Montgomery App. No. 11922, unreported.

Kuntz first argues that the trial court was not deprived of jurisdiction to consider a Civ. R. 60(B) by the filing of a notice of appeal. However, as we noted in our prior decision, "the trial court loses jurisdiction to take action in a cause after an appeal has been taken[.]" *Dayton v. Kuntz* (June 13, 1990), Montgomery App. No. 11922, unreported, citing, *State, ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St. 2d 94, 97. Kuntz's first proposition is accordingly without merit.

Kuntz next argues that a portion of the attorney fees due the law firm of Manley, Burke & Fischer were ordered paid in a memorandum opinion of the United States District Court for the District of Delaware, *In Re One Westminister*, No. 89-281-JRR (D. Del. filed June 7, 1990). However, that opinion did not order payment of any fees and Kuntz fails to provide any other evidence, beyond bare assertions, that a portion of the fees were in fact paid. Kuntz's second proposition is equally without merit.

Appellant Kuntz's motion for reconsideration is denied.

WILLIAM H. WOLFF, JR.
PRESIDING JUDGE

RICHARD K. WILSON, JUDGE

THOMAS J. GRADY, JUDGE

Copies mailed to:

Timothy A. Fischer, Esq.
William Kuntz, III
Honorable Robert N. Brown

Mailed To Clerk's Office on September 5, 1990.

IN THE

COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

CITY OF DAYTON
Plaintiff-Appellee

vs.

WILLIAM KUNTZ, III
Defendant-Appellant

Case Nos. 11870 and 11922

DECISION AND ENTRY

Rendered on the 7th day of September, 1990.

TIMOTHY A. FISCHER, Manley, Burke & Fischer, 4100 Carew Tower, Cincinnati, Ohio 45202, Attorney for Plaintiffs-Appellees

WILLIAM KUNTZ, III, P.O. Box 1722 Broadway Station, Albany, New York 12201-1722, Defendant-Appellant *Pro Se*

PER CURIAM:

This matter is before the court on an application for reconsideration and clarification filed by Defendant-Appellant William Kuntz, III, requesting that we review our decision of *Dayton v. Kuntz* (June 13, 1990), Montgomery App. No. 11870 and *Dayton v. Kuntz* (June 13, 1990), Montgomery App. No. 11922.

The issues raised in Mr. Kuntz's present motion were previously addressed by this court when we denied his first motion for reconsideration. See, *Dayton v. Kuntz* (July 30, 1990), Montgomery App. Nos. 11870 & 11922, unreported. Mr. Kuntz's present application for reconsideration and clarification is, accordingly, denied.

It is so ORDERED.

WILLIAM H. WOLFF, JR.
PRESIDING JUDGE

RICHARD K. WILSON, JUDGE

THOMAS J. GRADY, JUDGE

Copies mailed to:

Timothy A. Fischer, Esq.
Manley, Burke & Fischer
4100 Carew Tower
Cincinnati, Ohio 45202

William Kuntz, III
P.O. Box 1722 Broadway Station
Albany, New York 12201-1722

Hon. Robert M. Brown
41 North Perry Street
Dayton, Ohio 45402

Appendix I—Decision and Entry Amending the Order of Distribution (Sustaining Counsel's Motion to Amend Distribution)

IN THE

COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO GENERAL DIVISION

CITY OF DAYTON,

Plaintiff,

v.

WILLIAM KUNTZ, III, *et al.*,

Defendants.

CASE NO. 86-2439

(Judge Robert M. Brown)

This cause is before the Court on the motion of Robert E. Manley and Manley, Burke, and Fischer, a Legal Professional Association, filed herein on August 4, 1989, seeking an order of this Court amending the previous order of distribution journalized in this case on May 30, 1989. The motion is supported by a memorandum, a copy of an earlier decision of this Court, a copy of a decision of the Court of Appeals, and a copy of the original motion for an amended order of distribution. To the original motion is attached an affidavit of counsel relative to the basis for the fees claimed by the movant. To this motion the Defendant, William Kuntz, *Pro Se,* filed "Observations" contra on August 14, 1989. This prompted a memorandum from movants on August 14, 1989. This motion is ready for decision pur-

suant to Rule 2.09 or this Court. The Court finds the motion well taken.

The Court finds that the Defendant, William Kuntz, has violated the terms and conditions of his agreement with the movants as his attorneys. The Court finds that the movants are entitled to a "charging lien." *Cohen v. Goldberger* (1923), 109 Ohio St. 22. The Court concludes that the movants are entitled to $51,101.21 out of the funds presently being held by the Clerk of this Court.

It is therefore ORDERED that the motion of Robert E. Manley and Manley, Burke, and Fischer, filed herein on August 4, 1989, be, and the same is hereby SUSTAINED.

It is further ORDERED that the Clerk of this Court distribute to Robert E. Manley out of the fund being held in this action by the Clerk of Courts the sum of $51,101.21.

Finally, it is ORDERED that the Clerk hold the remainder in the amount of $22,043.91, subject to the further order of this Court.

Copies of the within Decision and Entry shall be mailed by ordinary mail on the date of filing to counsel listed below.

APPROVED:

ROBERT M. BROWN, JUDGE

ROBERT E. MANLEY, Attorney at Law, 4100 Carew Tower, Cincinnati, Ohio 45202

WILLIAM KUNTZ, III, Box 1722—Broadway Station, Albany, New York 12201-1722

JACK D. REAY, Bailiff

Appendix J—Order of the United States Bankruptcy Court

IN THE

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:

ONE WESTMINISTER CO., INC.

Debtor

Case 83-14

ORDER AUTHORIZING PAYMENT OF SPECIAL COUNSEL BY DEBTOR

At Wilmington, in said District, on this May 15th, 1989.

Upon the application of Manley, Burke & Fischer, A Legal Professional Association, retained, pursuant to order of this court dated October 14, 1986, to serve as special counsel in regard to litigation then pending in Dayton, Ohio, for the purpose of defending debtor's interest in property sought to be appropriated by the City of Dayton (Case No. 86-2439; Court of Common Pleas, Montgomery County, Ohio), and upon consideration of the petition of Manley, Burke & Fischer for allowance of compensation for the period beginning August 29, 1986, and ending September 30, 1986, and upon consideration of the supple-

mental petition for compensation from the period October 1, 1988, through February 10, 1989, and upon consideration of evidence presented at a hearing held by this court upon said application on May 8, 1989, the court finds that the total amount sought as compensation, expenses and unpaid witness fees is $54,918.16, but that such request will be reduced by the following amounts:

1) Travel time shall be compensated at one half of the hourly rate which would otherwise be charged, resulting in a reduction of the fees sought of $1,225.00; and

2) The request of the petitioner for interest upon the unpaid balance from the date billed to the date of payment is denied, resulting in an additional reduction from the amount sought of $6,003.69.

IT IS THEREFORE ORDERED that the debtor be and is hereby authorized to pay to Manley, Burke & Fischer, as special counsel to the debtor, the sum of $47,689.47.

HELEN S. BALICK
Bankruptcy Judge

6307G/rrv

cc/Peter J. Walsh, Esq.
Sam Abrams, Esq.
William Kuntz, III

Appendix K—Extract from a Transcript Before the United States Bankruptcy Court

IN THE

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:

ONE WESTMINISTER CO., INC.,

Debtor

Chapter 11 No. 83-14

BEFORE: THE HONORABLE HELEN S. BALICK

HEARING ON FEE APPLICATION FOR TRUSTEE AND WITHDRAWAL OF TRUSTEE.

July 5, 1989
11:00 o'clock, a.m.

The Court: Mr. Walsh.

Mr. Walsh: Thank you, Your Honor.

This is in the One Westminister case, the time set by the court to hear two applications which I have filed as trustee in the case, one application seeking authorization to withdraw, the other application seeking compensation for myself, as trustee, and my firm, as counsel to the trustee, for services rendered and costs advanced in this case.

I assume that with Your Honor's usual practice, you read the motion, so I'll be brief.

This case is six-and-a-half years old. There hasn't been much activity in this court, but there's been a lot of activity in Ohio.

The court may recall that about a month ago, we had a two- or three-hour—probably a two-hour hearing on Mr. Manley's fee application. And at that time, I think we fairly well reviewed how this case got to where it is.

And at that time, I indicated that, as far as I was concerned, my reason for being in the case was no longer there and I would file an application. I indicated that on the record. Mr. Kuntz indicated he agreed with that approach and this is where we are.

The fee application indicates that there's billable time in this case of approximately $9,600. My fee request is $7,500.

The reason that I have cut that is very simple. There's nothing unusual in terms of professional services that I provided in this case.

Quite frankly, most of my time in this case was involved in either counseling or listening to or hearing from Mr. Kuntz.

And as we know, he is a very prodigious letter writer and communicator, motion movement applicant, et cetera. And he generated a lot of activity in this case, and presumably will in the future, but hopefully without me.

In the application on the motion to withdraw, I have indicated that there is remaining in an interest-bearing account at this time approximately $132,000.

Now, subsequent to the filing of this application, I paid the Manley, Burke and Fisher fee of $47,689.47. That was paid pursuant to the court's May 15th order.

There has been an appeal taken by Mr. Kuntz from that order; however, no application was made to stay the order,

so that pursuant to Rule 8005, the order became final and I delivered a check to Manley, Burke and Fisher.

Manley, Burke and Fisher wrote to me requesting that I do that in view of the fact that the order had not been stayed. I thought that was entirely proper and I paid that bill.

Manley, Burke and Fisher wrote to me and indicated that should the unlikely thing happen on appeal, that is, the order is reversed or in some way modified to reduce their fee, they represented that they are—and I believe they are—a financially responsible firm and they have committed to refund to the estate any reduction in the fee should that result from the appeal. Under the circumstances, I thought it appropriate to pay that fee at this time.

There is now remaining in the estate account, $85,011.97. Those calculations are based upon a March 31, 1989 balance. So it's probably—the number is probably a little

* * *

Appendix L—Complaint in Manley, Burke & Fischer vs. Kuntz

COURT OF COMMON PLEAS
MONTGOMERY COUNTY, OHIO
GENERAL DIVISION

MANLEY, BURKE & FISCHER, A LEGAL PROFESSIONAL ASSOCIATION, 4100 CAREW TOWER, CINCINNATI, OHIO 45202

Plaintiff

vs

WILLIAM KUNTZ III, 11 PEARL STREET, ALBANY, NEW YORK 12207

Defendant

Case No. 89-2416

1. The plaintiff is an Ohio corporation in good standing engaged in the practice of law in the State of Ohio and elsewhere.

2. The defendant William Kuntz III is an individual and a former client of the plaintiff.

3. On or about August 28, 1986, the defendant engaged the plaintiff to perform legal services with respect to an eminent domain action then pending against the defendant and others in the Court of Common Pleas of Montgomery County, Ohio, Case No. 86-2439.

4. Pursuant to this contract of employment, defendant agreed to pay plaintiff for legal services performed with respect to Case No. 86-2439, then pending in the Court of Common Pleas, Montgomery County, Ohio.

5. Defendant was one of two owners of the real property sought to be acquired by the City of Dayton in the litigation described in paragraph number three.

6. Plaintiff was also retained by One Westminister Company, a Delaware corporation which was the other owner of the property sought to be appropriated in Case No. 86-2439, which corporation was then in bankruptcy proceedings in the United States District Court for the District of Delaware.

7. Pursuant to this agreement, plaintiff undertook and did provide representation for the owners of the real property sought to be condemned, including litigation in the Court of Common Pleas, the Court of Appeals, the Supreme Court of Ohio and the Supreme Court of the United States.

8. Pursuant to the agreement for employment, and as is reflected on the account attached hereto as Exhibit A, plaintiff has been paid the sum of $20,000 by defendant as partial payment for these services and expenses, and the plaintiff has been paid the sum of $47,689.47 by One Westminister Company, also as partial payment on the outstanding amount.

9. The contract of employment provides that unpaid balances shall accrue interest at the rate of 10% until paid.

10. Pursuant to order of the Bankruptcy Court for the District of Delaware, One Westminister Company is fully discharged from any further obligation to compensate plaintiff pursuant to the agreement of employment.

11. There remains due and owing from the defendant to the plaintiff, as set forth in Exhibit A attached hereto and incorporated herein, the sum of $51,746.70 through July 10, 1989, plus interest at the contract rate of 10% from that date to the date of the judgment sought by the plaintiff herein.

12. Defendant has refused to pay plaintiff the amount outstanding.

13. Plaintiff has fully performed all of its contractual obligations to provide legal services.

14. Accordingly, the plaintiff demands judgment from the defendant in the amount of $51,746.70 plus interest at the rate at 10% from July 10, 1989 to the date of judgment, plus interest at the judgment rate from the date of judgment to satisfaction of the judgment.

TIMOTHY A. FISCHER
Attorney for Plaintiff
Manley, Burke & Fischer
4100 Carew Tower
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

Of Counsel:
Manley, Burke & Fischer
4100 Carew Tower
Cincinnati, Ohio 45202

PATRICK F. MEYER
Clerk of Courts

1989 JUL 17 PM 1:59

MONTGOMERY COUNTY
FILED—COURT OF
COMMON PLEAS

Supreme Court, U.S.
FILED
MAR 25 1991
OFFICE OF THE CLERK

No. 90-1393 (3)

IN THE

SUPREME COURT OF THE UNITED STATES

1990 TERM

WILLIAM KUNTZ, III, et al.

Petitioner,

against

THE CITY OF DAYTON, OHIO, et al.

Respondent.

MEMORANDUM OF RESPONDENT MANLEY, BURKE & FISCHER IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, SECOND APPELLATE DISTRICT MONTGOMERY COUNTY, OHIO

Timothy A. Fischer, Esq.
Attorney for Respondent
Manley, Burke & Fischer
225 West Court Street
Cincinnati, Ohio 45202
(513) 721-5525

I. ARGUMENT

There is no federal statutory or constitutional issue of any kind presented by this petition. Manley, Burke & Fischer (a corporation having no parent or subsidiary or affiliated companies) was retained by both of the joint owners of real estate as counsel to defend an eminent domain proceeding brought by the City of Dayton, Ohio. One joint owner was a corporation then in bankruptcy in Delaware and the other joint owner was the petitioner, an individual resident of New York; there was a written contract, and the representation was approved in advance by the Bankruptcy Court.

After the litigation, Manley, Burke & Fischer, pursuant to its written agreement, requested payment of its bill, 50% from the corporation in bankruptcy and 50% from the individual petitioner.

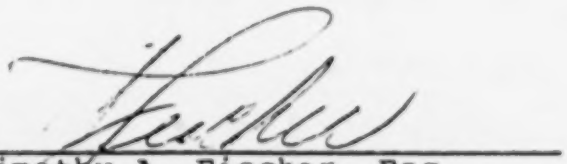
Upon written application to the Bankruptcy Court, and after a hearing, the court allowed approximately $47,000 to be paid by the trustee. That ruling was affirmed by the District Court and further by the Third Circuit, upon appeals taken by the petitioner herein.

When the individual petitioner declined to pay his individual 50%, Manley, Burke & Fischer requested that the Court of Common Pleas enforce the Ohio common law attorneys' charging lien and award respondent the fees due to it from the proceeds of the judgment which were still in the possession of the Court. The decision by the Court of Common Pleas to utilize the Ohio common law doctrine of the attorneys' charging lien to pay respondent from the funds generated

through the eminent domain litigation was affirmed by the Court of Appeals; the Supreme Court of Ohio declined to accept the matter for further review.

Petitioner is now asking this court to review the decision by the Court of Common Pleas to utilize Ohio's common law doctrine of the attorneys' charging lien in the circumstances described above. There is no federal statutory or constitutional question presented, nor is there even a question of Ohio Constitutional law. Petitioner's awkward attempt to somehow entwine the doctrine of the attorneys' charging lien into the pending bankruptcy case is unconvincing; the two matters are simply unrelated and, in any event, do not raise questions of constitutional law or a federal statutory law.

Accordingly, respondent respectfully requests that the petition for writ of certiorari be denied.



Timothy A. Fischer, Esq.
Attorney for Respondent
Manley, Burke & Fischer
225 West Court Street
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

OF COUNSEL:

Manley, Burke & Fischer
225 West Court Street
Cincinnati, Ohio 45202

ACKNOWLEDGEMENT OF SERVICE

I hereby certify that the foregoing Memorandum of Respondent Manley, Burke & Fischer in Opposition to the Petition for Writ of Certiorari is being mailed to Petitioner, William Kuntz III, Box 1722, Broadway Station, Albany, New York 11201, on the 21 day of March, 1991. All parties required to be served have been served, as indicated above.

Timothy A. Fischer

2529I/rrv